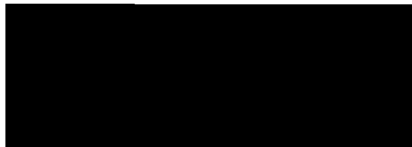


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**



D7

DATE: **DEC 27 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims that it is engaged in the “distribution of industrial products and supply chain management in 12 countries and 156 branches.” The petitioner states that it is a wholly-owned subsidiary of [REDACTED], located in the People’s Republic of China. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner seeks the beneficiary to fill the position of International Trading Desk Manager.

The director denied the petition on April 9, 2009, concluding that the record contains insufficient evidence to demonstrate that: (1) the beneficiary has been or will be employed in a primarily executive or managerial capacity; and (2) the beneficiary does not possess at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien’s prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien’s prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on March 6, 2009. In a support letter dated February 23, 2009, the petitioner explained that the beneficiary will continue to fill the position as International Trading Desk Manager and is “responsible for managing all international trade activities between [the petitioner] and its wholly-owned subsidiary, [the foreign company], where she has worked for over five (5) years.” The petitioner described the duties to be performed by the beneficiary in the United States as follows:

1. [The beneficiary] will be responsible for the trading transaction between [the petitioner] and its wholly-owned subsidiary, [the foreign company], including both USA manufactured products sold to China and China manufactured products to USA specification.
2. [The beneficiary] will be responsible for coordinating among [the petitioner] branch operations and [the foreign company] purchasing and manufacturing operations the quotation, order and transaction management process in both English and Chinese languages. She will provide direction on new processes in order to assure USA made products shipped to China and China manufactured products meet USA customer specifications.
3. [The beneficiary] will also have the responsibility for setting up new systems and procedures for global services utilizing her knowledge of both the IT system in [the foreign company] and [the petitioner] and the processes being utilized in these transactions based upon her [petitioner] experience.
4. [The beneficiary] will work during both daytime and nighttime schedules to be able to communicate real time with [the foreign company] employees in the Chinese language. Based upon her close association with [the foreign company] employees and Chinese language render her services in this role almost unable to be filled by a citizen of the United States.

On March 13, 2009, the director determined that the petitioner did not submit sufficient evidence to process the petition and requested additional evidence.

In response to the director’s request for evidence, the petitioner submitted two global organizational charts for the petitioner, one with the position the beneficiary held with the foreign company and the second with the

position the beneficiary would fill in the United States. According to the charts, the beneficiary held the position of Director of Administration when she was employed with the foreign company. The position is supervised by the vice general manager administration and it does not appear that the beneficiary supervised any employees. The second chart shows the position the beneficiary would fill in the United States as International Trading Desk Manager; it does not appear that the beneficiary supervises any employees.

The director denied the petition, in part, on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

On appeal, the petitioner provided the following information regarding the beneficiary's position abroad with the foreign company and the position to be held in the United States for the petitioner as follows:

The Beneficiary, [the beneficiary] while working in [the foreign company] supervised all branch activities engaged in international trade and logistics reporting to the country General Manager, [REDACTED] and the Vice General Manager, [REDACTED]. A more detailed chart of organization showing not only the officers above [the beneficiary] but also the operations that she directed the trading and logistics of is attached as Exhibit D. The USA chart of organization is attached as Exhibit E.

This position was extremely technical and sophisticated in that all branches of [the foreign company] (16 Branches, 173 employees) reported their international transactions through [the beneficiary]. This process literally changes daily, weekly and monthly in foreign currency, VAT, customs duties and dumping duties that requires an expertise that is not generally available in industry and only limited in availability from a certain limited specialized freight forwarding companies that are unreliable and inconsistent. This skill is not only not available in either China or the USA-but required a continual daily up-dating of the changing requirements, in both Chinese and English from the respective governmental entities of China and the USA, and the many agencies thereof and the communicating and directing and managing these requirement among the 16 operations and 173 employees in China and the 56 branches and 533 employees in the USA, both in English and in Chinese. The Chinese regulations of the Bureau of Foreign currency change continuously. The Anti-Dumping Duties assessed by the USA Department of Commerce change continuously and are difficult to obtain without skilled research. A professional skill that is neither taught not readily sold. The business of the Petitioner in both importing and exporting USA products to China and from China to the USA is materially dependent upon these skills. . . .

On appeal, the petitioner submits two new Global Charts of Organization of the petitioner and subsidiaries for the beneficiary's position abroad and for the position in the United States. According to the new charts, the beneficiary held the position of Director of Administration for the foreign company and she supervised the "branch operations and trading activities" for 16 branches and 173 employees in China and the "branch operations and trading activities" for 56 branches and 533 employees in the United States. In the second chart, it shows that the beneficiary would fill the position of International Trade Desk Manager in the United States and she would supervise 56 branches and 502 employees.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

The beneficiary's proposed job description is vague, and states that the beneficiary will be responsible for the "trading transaction between [the petitioner] and its wholly-owned subsidiary, [the foreign company], including both USA manufactured products sold to China and China manufactured products to USA specification"; "coordinating among [the petitioner] branch operations and [the foreign company] purchasing and manufacturing operations the quotation, order and transaction management process"; and "provide direction on new processes in order to assure USA made products shipped to China and China manufactured products meet USA customer specifications." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the job duties required of the beneficiary include non-qualifying duties such as: "setting up new systems and procedures for global services utilizing her knowledge of both the IT system in [the foreign company] and [the petitioner] and the processes being utilized in these transactions based upon her [petitioner] experience." Since the petitioner has not explained what employees are supervised by the beneficiary, it is not clear if the beneficiary will be providing the services of IT systems and procedures development, or will coordinate the branch operations on her own. Again, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how her time will be divided among managerial and non-managerial duties. In addition, the petitioner has not provided a breakdown of the percentage of time the beneficiary will spend on various duties, and the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted. In addition, the petitioner provided two different global organizational charts for the position the beneficiary will hold in the United States. In response to the request for evidence, the petitioner submitted an organizational chart of the U.S. office indicating that the beneficiary will fill the position of International Trading Desk Manager and the chart does not indicate that she supervises any employees. However, on appeal, the petitioner submits a second global organizational chart that shows the beneficiary will supervise 56 branches and 502 employees. It is not clear why the first organizational chart did not indicate this and why the petitioner revealed this information only on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As discussed above, the beneficiary's job description was not sufficient to establish that she would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of an executive or manager as contemplated by the governing statute and regulations.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In this case, we have no information of the employees supervised by the beneficiary, if any, and thus, we cannot determine if the employees supervised are professional. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It does not appear that the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity. The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. In the request for evidence, the director requested that the petitioner submit a definitive statement describing the foreign

employment of the beneficiary. The petitioner provided a very vague statement in its response. This evidence is critical, as it would have established if the beneficiary held a position of managerial or executive capacity by the foreign company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity.

On appeal, the petitioner states that the beneficiary's position abroad was "extremely technical and sophisticated in that all branches of [the foreign company] (16 Branches, 173 employees) reported their international transactions through [the beneficiary]." Without additional information, it is impossible to determine the day-to-day duties performed by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner provided two different global organizational charts for the position the beneficiary held abroad. In response to the request for evidence, the petitioner submitted an organizational chart of the foreign company showing that the beneficiary filled the position of Director of Administration and the chart does not indicate that she supervised any employees. On appeal, the petitioner submits a second global organizational chart and in this one it shows that the beneficiary supervised "branch operations and trading activities" in China and the United States which included 72 branches and 706 employees total. It is not clear why the first organizational chart did not indicate this and why the petitioner revealed this information for the first time on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The final issue to be addressed is whether the petitioner has established that the beneficiary possesses at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition. In the denial decision, the director noted that the record indicates that the beneficiary was admitted to the United States on May 1, 2007, as an L-2 nonimmigrant until April 5, 2009. The beneficiary commenced working with the foreign company on March 1, 2001. Thus, the beneficiary was working for the foreign company from March 6, 2006 until she entered the United States on May 1, 2007, thus she was employed by the foreign company for one continuous year within the three years preceding the filing of the instant petition on March 6, 2009. The AAO will withdraw this portion of the director's decision. As noted above, however, the petitioner did not provide sufficient evidence that the position held by the beneficiary with the foreign company was in a primarily managerial or executive capacity.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.